MICHAEL V. McLUCAS

IBLA 99-80 Decided November 2, 2000

Appeal from a decision record of the Deschutes Resource Area Manager, Prineville District Office, Bureau of Land Management, Oregon, approving Land Exchange OR-49206.

Dismissed.

1. Appeals: Generally--Exchanges of Land: Generally--Rules of Practice: Appeals: Dismissal

An appeal of a decision implementing a land exchange is properly dismissed as moot when it is filed after legal title to the land has been transferred, BLM no longer has jurisdiction over the lands transferred out of Government ownership, and appellant's requested relief cannot be afforded.

APPEARANCES: Michael V. McLucas, Maupin, Oregon, pro se; Shaaron Netherton, Acting Area Manager, Deschutes Resource Area, Prineville, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On May 3, 1996, the Deschutes Resource Area Manager, Prineville District, Bureau of Land Management (BLM), issued a decision record implementing the Criterion Land Exchange OR-49206. According to the environmental assessment (EA) for the exchange (EA No. OR-056-4-031) the land exchange between the Prineville District Office, BLM, and the Conservation Fund, the Deschutes Club, and William Smith Properties involved approximately 11,680 acres of private land and approximately 12,440 acres of public land. (EA at i.)

In a letter to BLM dated August 17, 1998, McLucas, who is an outfitter with a BLM commercial permit for guide use along the lower Deschutes River, stated that his "letter served as written notice that I protest, and appeal that decision to make certain land trades between the Portland Deschutes Club" and BLM. The action to which McLucas made reference was that part of the Criterion Land Exchange which involved the exchange of land and easements between the United States and the Deschutes Club (formerly known as the Portland Deschutes Club). That part of the exchange was completed in late 1997 and early 1998. (BLM's Answer, Exhs. C and D.)

In a subsequent letter to BLM dated September 7, 1998, McLucas expressed concern over the lack of a response to his first letter and renewed his objections to the exchange, particularly a lack of "proper and sufficient notice," as required by 43 C.F.R. §§ 2201.2 and 2201.7-1. He stated that his first notice of any exchange of lands came when he was informed by members of the Deschutes Club or their guests that he was in trespass on lands that "historically had been identified by Cadastral Survey as BLM owned Public Lands." McLucas did not state when he received that information. He further alleged that the exchange had failed to meet 43 C.F.R. § 2201.5, requiring approximate equality in value of parcels to be exchanged. He asserted that the exchange would work a hardship on him as a fishing outfitter because the public lands were "traded away without lands of comparable worth being received in exchange."

BLM considered the documents filed by McLucas to be an appeal and forwarded the administrative record for the Criterion Land Exchange to the Board, stating in a cover letter dated October 24, 1998, that "Mr. McLucas has appealed a small portion of the exchange dealing with the Deschutes Club lands." On February 22, 1999, the Board issued an order suspending consideration of the appeal for a period of 60 days from the date of our order "to allow the parties to attempt to resolve this appeal." We observed that it appeared that a meeting between McLucas and BLM "with BLM providing an explanation of its actions" might negate the necessity for adjudication by this Board. On May 13, 1999, we received a letter from McLucas stating that he devoted considerable time and effort towards the possibility of compromise, but that "I have waited this long time in vain hope for a response from the BLM. There has been none." Thereafter, we issued an order directing BLM to file an answer to the documents filed by McLucas.

In its answer, BLM admits that appellant "was not given specific written notice of the proposed exchange," but it states that the outfitter community was "briefed in general at guide and outfitter meetings" and that the decision record for the Criterion Land Exchange was published in newspapers throughout central Oregon on May 9, 1996. 1/ Moreover, BLM states, appellant was an active participant in the planning process for the lower Deschutes River and that various final decisions in the Lower Deschutes River Management Plan/Environmental Impact Statement (EIS)- Volume 1 (1993) (BLM's Answer, Exh. B) outlined the intent of BLM regarding future actions with the Deschutes Club dealing with access.

Appellant contends that the outfitting public and the general public were repeatedly assured throughout the multiyear process that public access would be provided for and protected. Appellant asserts that as a result

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1/ Under 43 C.F.R. § 4.410(a), any party to a case who is adversely affected by a BLM decision has a right of appeal to this Board. We consider the decision record issued by the Deschutes Resource Area Manager on May 3, 1996, implementing the exchange to be the "decision" for which McLucas seeks Board review.

of the exchanges with the Deschutes Club there have been severe losses of historically recognized public access. He alleges that holders of grazing permits were notified of changes in land holdings, but that special recreation permit holders were not.

BLM asserts that the evaluation of recreational values of the exchanged land is a judgment call. It asserts that through the exchange, it obtained legal hiking access to portions of the river to which there was previously no public legal access. Although lands with recreational value were transferred out of BLM ownership in part to resolve long-standing trespass issues, BLM asserts that it acquired lands with recreational values in exchange.

Appellant responds that when the Acting Deschutes Resource Area Manager and other BLM officials took an on ground tour with outfitter representatives "they were forced to admit that the public incurred a significant net loss in useable public lands." (Response to BLM's Answer at 2.) Appellant does not, however, explain when such a tour took place. He does assert that BLM's characterization in its decision record (BLM's Answer, Exh. A) that the tracts of public land considered for disposal are "small, isolated parcels" is inaccurate. He contends that the public lands exchanged were part of larger tracts from which they were separated by the exchange.

BLM notes that appellant's guide and outfitter's permit is not limited to specific locations along the river, but is "valid for the entire 100 miles of the lower Deschutes River." (BLM's Answer at 2.) It states that according to appellant's operating plan, only 35 percent of his operations take place along the 40-mile segment of river where the exchanged lands are located. Since there are, within this 40-mile segment, 19 miles of public lands on the east bank and 6 miles of public land on the west bank, BLM states that it appears that there will be no economic hardship for appellant or other fishing guides.

Appellant takes umbrage with BLM's statement that he is not limited to specific locations. He points out that he is limited to use of public lands and waters and he states that the public land base was changed without notification to affected users. He also states that he is offended by BLM's representation that the exchange does not appear to cause any economic hardship. As he points out, "they really don't know because they never provided us the opportunity to comment" on the exchange. (Response to BLM's Answer at 2.)

In conclusion, BLM admits that appellant was not notified of the specifics of the exchange with the Deschutes Club "beyond those decisions in the Lower Deschutes River Management Plan and EIS." (Answer at 2.) However, it notes that, since the land and easements in question were transferred in late 1997 and early 1998, it no longer has any authority over them. It recommends that the appeal be dismissed as moot because the land in question is now private land over which the Board has no authority.

Appellant responds that there was no opportunity to appeal at any earlier date, "because the specifics of the land traded were concealed and proper and required legal notice was never provided to the affected publics." (Response to BLM's Answer at 2.) He asserts that "[i]t would clearly be in the best interest of both BLM and the Portland Deschutes Club to clear any 'color' from titles which would seem to exist as a result of BLM actions which were not responsive to applicable statutory requirements." Id. at 3.

The exchange regulations provide that, upon entering into an agreement to initiate an exchange, the BLM authorized officer is required to publish notice thereof in local newspapers and to "notify authorized users." 43 C.F.R. § 2201.2(a). The notice is an invitation to submit in writing comments on or concerns about the exchange proposal. 43 C.F.R. § 2201.2(a)(4). BLM admits that it did not notify appellant as required by this regulation. With respect to the other regulation regarding notice cited by appellant, 43 C.F.R. § 2201.7(a)(1) provides for publication of a notice of availability of a decision approving an exchange. While BLM asserts that the decision record for the Criterion Land Exchange was published in newspapers throughout central Oregon, appellant contends that the Deschutes Club land exchange was "conceived and pursued as a separate land exchange from any other 'assembled' parcels known as the 'Criterion Land Exchange.'" (Response to BLM's Answer at 2.) Appellant also asserts a violation of the valuation regulation at 43 C.F.R. § 2201.5. However, he has not provided any evidence to show that the relative values of the exchanged parcels were not as they were required to be by that regulation.

[1] We note that the regulations require that an appeal be filed within 30 days of the date of service of the decision being appealed. 43 C.F.R. § 4.411(a). The decision being appealed in this case is dated May 3, 1996. While the same regulation establishes a deadline for filing an appeal from decisions published in the Federal Register (30 days from the date of publication), the regulation is silent regarding decisions published, as the one in question, in local newspapers. There is no evidence that BLM served the decision record on appellant, but BLM alleges that the "outfitter community was aware that the exchange was happening" (Answer at 1), thus, implying that appellant had actual knowledge of the exchange. Appellant does not allege that he was unfamiliar with the decision record. He does not specify the date upon which he learned of the exchange; however, his record statements indicate that it was after completion of the exchange. Nevertheless, we need not decide whether or not appellant filed a timely appeal because, even assuming a timely appeal, disposition of this case is controlled by the circumstance that the exchange has been completed, the areas of concern to appellant are no longer subject to BLM jurisdiction, and, thus, we cannot afford appellant the relief he seeks.

Appellant has requested that the exchange "be negated" (September 7, 1998, Letter to BLM), and that BLM and the Deschutes Club "clear any 'color' from titles." (Response to BLM's Answer at 3.) This Board cannot

award such relief. It is well-established that this Board has no authority to render decisions to recover title to, or rights in, land which was already patented to a private party. E.g., Eddie S. Beroldo, 123 IBLA 156, 158 (1992); Virgil Horn, 117 IBLA 10, 11-12 (1991); David C. Brookens, 85 IBLA 1, 3-4 (1985); Hank Patterson, 71 IBLA 109, 110 (1983); Mary A. A. Aspinwall (On Reconsideration), 66 IBLA 367, 370 (1982). The proper avenue for clearing title lies in the federal courts. Henry J. Hudspeth, Sr., 78 IBLA 235, 237 (1993). Absent jurisdiction over the land, we cannot afford appellant the relief he seeks. Accordingly, we must dismiss the appeal.

Despite our dismissal, we must stress in the strongest terms that BLM has an obligation to comply with its regulations, and by failing to notify appellant, as required by 43 C.F.R. § 2201.2(a), of an agreement to initiate an exchange and soliciting his comments, it proceeded to implement the exchange without providing appellant with the opportunity to submit comments which, appellant asserts, would have shown that the land exchange with the Deschutes Club was not in the public interest. Such a failure fosters mistrust of public officials and precipitates appeals which might otherwise be avoided.

It is difficult on the present record to determine to what extent appellant's substantive concerns have merit, and we will not attempt to resolve those concerns because of our lack of jurisdiction. However, we note that in BLM's answer it states that it

> has been discussing the access issue with both the Deschutes Club and the Appellant; the Deschutes Club has indicated a willingness for further discussion to assess the fishing and access issues. The BLM will continue to work with the Appellant and the Deschutes Club to try and resolve some of these issues that have arisen since the transfer of ownership.

(Answer at 3.) We urge BLM to continue to facilitate discussions to satisfy appellant's concerns.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Lisa Hemmer
Administrative Judge